105. GTE requests clarification of the "one-time" notification rules,[293] noting that, under section 64.2007(f)(3), solicitation of approval to use CPNI must be proximate to the notification of a customer's CPNI rights. Further, section 64.2007(f)(4) requires that, if the solicitation for consent is in writing, then it must be in the same notification document. GTE concludes that these rules conflict—oral requests for consent can follow written notification at any time proximate to the notification, which GTE interprets as within one year of the solicited consent, but written requests for consent cannot (*i.e.*, they must be in the same document as the written notification). GTE requests that the Commission "clarify that written notice followed proximately by either written or oral solicitation is sufficient and is consistent with the FCC's finding that 'one-time' notice is sufficient."[294] GTE contends that this would require amending section 64.2007(f)(4).

106. SBC also requests that the Commission clarify that written notification followed by either an oral or written solicitation for approval is appropriate under the one-time notification scheme.[295] SBC posits that, as both oral and written notification offer advantages over the other in particular circumstances, it is preferable to furnish providers with the flexibility to use either approach. Frontier asserts that the Commission "did not justify" the requirement that written solicitations for approval to use CPNI be in the same document as written notifications.[296] Frontier argues that the Commission indicated elsewhere in the *Order* that notification must be made prior to solicitation, notification is required only once, and carriers may solicit customers multiple times. Frontier suggests that the Commission may have meant to require that *if* the solicitation and notification are contained in the same document, then the notification must come first. Finally, from a policy perspective, Frontier claims that this rule provides an incentive for carriers to rely upon less reliable and auditable oral notifications.[297]

107. Omnipoint requests that, for CMRS providers, the Commission replace its "opt-in" requirement for approval of the use of CPNI with an "opt-out" rule.[298] MCI opposes Omnipoint's proposal, claiming that the CMRS market doesn't present any better case for "opt-out" than does the wireline market, that an "opt-out" proposal would favor large carriers with greater CPNI resources, and that carriers are not likely to solicit approvals so intrusively

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[293] GTE Petition at 39.

[294] GTE Petition at 39.

[295] SBC Comments at 24-25.

[296] Frontier Petition at 5-7.

[297] Frontier Petition at 7.

[298] Omnipoint Petition at 16-17.

as to drive their customers away.[299]

2. Discussion

108. We find that Omnipoint has presented no new circumstances that warrant reversal of the Commission's conclusion that the requirement of affirmative consent is consistent with Congressional intent, as well as with the principles of customer control and convenience.[300] Nor has Omnipoint shown that wireless carriers should not be subject to the requirement of affirmative consent.

109. We conclude, however, that the Commission should not attempt to micro-manage the methods by which carriers meet their obligations to secure customer consent. As long as the carrier can show that the rules previously promulgated, which ensure that the customer has been clearly notified of his or her right to refuse consent before the CPNI is used and that the notification clearly informs the customer of the consequences of giving or refusing consent, have been complied with, the consent will be effective. However, we note that those rules are specific in the requirements for written notification, *e.g.*, that the notice must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to the customer.[301] We intend to be vigilant in enforcing these rules, as we have in enforcing the rules against slamming, which similarly provide for clear and unambiguous notice to the telephone subscriber who signs a letter of agency for authorizing a change in his or her primary interexchange carrier.[302] This policy is also consistent with the Commission's recent action to help ensure that consumers are provided with essential information in phone bills in a clear and conspicuous manner.[303] We will entertain complaints that carriers have not met these requirements on a case-by-case basis.

110. We clarify, at Vanguard's request, that its plan for obtaining consent at the time of the execution of initial customer agreements would be appropriate assuming Vanguard provides "complete disclosure"[304] prior to seeking customer approval as required by section 64.2007(f) of the Commission's rules, and is otherwise compliant with the remainder of

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[299] MCI Comments at 54-55.

[300] *CPNI Order*, 13 FCC Rcd at 8130-8141, ¶¶ 91-102.

[301] 47 C.F.R. § 64.2007(f)(v).

[302] 47 C.F.R. § 64.1150(e).

[303] *Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CC Docket No. 98-170 (Sept. 17, 1998).

[304] Vanguard Petition at 18.

section 64.2007.[305] In other words, seeking customer consent at the time of execution of initial customer agreements is not prohibited by our rules.[306] We also concur with U S WEST's assertion, however, that carriers should be left with flexibility in implementing our rules.[307] Accordingly, Vanguard's proposal is merely one option among many that could comply with our rules.

111. Moreover, in keeping with our desire to avoid micro-management of the notification and authorization process, we shall grant SBC, Frontier, and GTE's requests that we eliminate section 64.2007(f)(4) of the Commission's rules. Section 64.2007(f)(4) requires that a carrier provide a solicitation for approval to use a customer's CPNI, if written, in the same document containing the one-time notification of the customer's CPNI rights.[308] These carriers argue that this section results in some confusion when read with the rest of section 64.2007. We agree that section 64.2007(f)(4) appears to contradict section 64.2007(f)(1) of our rules, which permits carriers to provide notification though *oral*, as well as written methods.[309] Moreover, we agree with Frontier that the rule may create a disincentive for carriers to rely upon less reliable and auditable oral notifications. Of course, this was not our intent. In light of these reasons, and our desire avoid micro-management, we will delete section 64.2007(f)(4) from our rules.

C. Preemption of State Notification Requirements

112. In the *CPNI Order*, we declined to exercise our preemption authority, although we concluded that in connection with CPNI regulation we "may preempt state regulation of intrastate telecommunications matters where such regulation would negate the Commission's

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[305] 47 C.F.R. § 2007.

[306] We note, however, that the Commission, in its slamming rules, and in their enforcement, has required that the letter of agency be a separate document. 47 C.F.R. § 64. 1150(b),(c); Long Distance Services, Inc., Apparent Liability for Forfeiture, File No. ENF-97-003, 13 FCC Rcd 4444 (Comm. Car. Bur. 1998). The Commission took this action in view of the consumer complaints showing that "abuse, misrepresentation, and consumer confusion occurs when an inducement and an LOA are combined in the same document in a deceptive or misleading manner." *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, CC Docket No. 94-129, 13 FCC Rcd 9560, 9571 (1995). We will be monitoring the performance of carriers under the CPNI rules to determine whether we should similarly require carriers to obtain consent for use of CPNI in a separate document.

[307] U S WEST Comments at 24.

[308] Section 64.2007(f)(4) states that: "[a] telecommunications carrier's solicitation for approval, if written, must not be on a document separate from the notification, even if such document is included within the same envelope or package." 47 C.F.R. § 64.2007(f)(4).

[309] 47 C.F.R. § 64.2007(f)(1).

exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from the intrastate aspects."[310] Rather, we stated that we would examine any conflicting state rules on a case-by-case basis once the states have had an opportunity to review the requirements we adopted in the *CPNI Order*.[311] At that time we noted that state rules that are vulnerable to preemption are those that (1) permit greater carrier use of CPNI than section 222 and the Commission's rules allow, or (2) seek to impose additional limitations on carriers' use of CPNI.[312] We also indicated, however, that state rules that would not directly conflict with the balance or goals set by Congress were not vulnerable to preemption. Such a rule, for example, might specify information that must be contained in the carrier's notice in addition to the information specified in the *CPNI Order*.[313]

113. On reconsideration, we affirm our decision to exercise our preemption authority on a case-by-case basis. We reject AT&T's request that the Commission "revisit [its] conclusion and hold that the FCC notice requirements are preemptive and that a state may not prescribe additional notice requirements."[314] AT&T argues that not doing so could put carriers at risk of expending millions of dollars soliciting customer approvals only to find that the notice does not comply with subsequently enacted state requirements.[315] While it is possible that states might impose additional CPNI conditions that could require the expenditure of resources, we conclude it would be inappropriate for the Commission to speculate in this proceeding about what such conditions might be and how much compliance might cost. AT&T further asserts that, at a minimum, the Commission should hold that any additional state requirements should have prospective effect only, and may not serve to invalidate CPNI authorizations previously and validly obtained in accordance with section 222 and the Commission's rules.[316] We note that while deciding to address preemption requests on a case-by-case basis, we reserve the right to consider the potential costs and burdens imposed by any state requirements that would apply retroactively. For these same reasons, we also deny GTE's request that we find that "additional CPNI use restrictions will be expeditiously preempted, particularly where other federal statutes, such as 47 U.S.C. § 227(c),

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310 *CPNI Order*, 13 FCC Rcd at 8075-78, ¶ 16-18.

311 *CPNI Order*, 13 FCC Rcd at 8077-78, ¶ 18.

312 *CPNI Order*, 13 FCC Rcd at 8077-78, ¶ 18.

313 *CPNI Order*, 13 FCC Rcd at 8077-78, ¶ 18.

314 AT&T Petition at 22.

315 AT&T Petition at 22-23; AT&T Reply at 9.

316 AT&T Petition at 23.

already address customer privacy concerns."[317]

114. Neither AT&T nor GTE has presented any new facts or arguments that require us to reconsider our prior ruling. Both GTE and AT&T point to the Comments of the Texas Public Utility Commission, which describe and attach a CPNI rule under consideration by the Texas Commission, as support for the need to reconsider our conclusion on preemption in the *CPNI Order*.[318] They assert that the proposed Texas rule is in conflict with the *CPNI Order* and the Commission's rules.[319] That Texas, or any other state, might implement CPNI rules that may be in conflict with our rules was certainly considered in the *CPNI Order*. If such an event occurs, AT&T, GTE, or any other party may request that we preempt the alleged conflicting rules. We will then consider the specific circumstances at that time.

D. Details of CPNI Notice

115. Section 64.2007 of our rules establishes the minimum form and content requirements of the notification a carrier must provide to a customer when seeking approval to use CPNI.[320] Section 64.2007(f)(2)(ii) requires that the notification must specify, inter alia, "the types of information that constitute CPNI" and "the specific entities" that will receive it.[321] GTE requests that the Commission clarify the rule to permit carriers to avoid exhaustively specifying all types of CPNI and all of a carrier's subsidiaries and affiliates that may receive CPNI.[322] We decline to do so. The minimum requirements of section 64.2007 were not crafted to provide precise guidance, but rather as general notice requirements.[323] The rule seeks to strike an appropriate balance between giving carriers flexibility to craft CPNI notices tailored to their business plans and ensuring that customers are adequately informed of their CPNI rights.[324]

116. Thus, at a minimum, a carrier must inform a customer of the types of CPNI it intends to use. We wish to ensure that any decision by a customer to grant or deny approval

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[317] GTE Reply at 9-10.

[318] AT&T Reply at 9-10; GTE Reply at 9-10; *see also* Texas PUC Comments at 1-4 and Attachment.

[319] AT&T Reply at 9-10; GTE Reply at 9-10.

[320] 47 C.F.R. § 64.2007.

[321] 47 C.F.R. § 64.2007(f)(2)(ii).

[322] GTE Petition at 43-44.

[323] *CPNI Order*, 13 FCC Rcd at 8161, ¶ 135.

[324] *CPNI Order*, 13 FCC Rcd at 8161, ¶ 135.

is fully informed[325] and that we reduce the potential for carrier abuse.[326] Also, to the extent a carrier intends to disseminate a customer's CPNI, the customer has a right to know the entities that will receive the CPNI derived from his or her calling habits. Contrary to GTE's assertion, we don't believe that a customer necessarily will be confused by the name of the recipient.[327] Importantly, the customer should have the option of restricting access to CPNI among the carrier's intended recipients of his or her personal information.

VII. SAFEGUARDS UNDER SECTION 222

A. Background

117. In the *CPNI Order*, the Commission concluded that "all telecommunications carriers must establish effective safeguards to protect against unauthorized access to CPNI by their employees or agents, or by unaffiliated third parties."[328] To this end, we required carriers to develop and implement software systems that "flag" customer service records in connection with CPNI,[329] and maintain an electronic audit mechanism ("audit trail") that tracks access to customer accounts.[330] In addition, the *CPNI Order* stated that carriers were to: train their employees as to when it would be permissible to access customers' CPNI; establish a supervisory review process that ensures compliance with CPNI restrictions when conducting outbound marketing; and, on an annual basis, submit a certification signed by a current corporate officer attesting that he or she has personal knowledge that the carrier is in compliance with the Commission's requirements.[331] Because the Commission anticipated that

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[325] *CPNI Order*, 13 FCC Rcd at 8161-62, ¶ 136.

[326] *CPNI Order*, 13 FCC Rcd at 8161, ¶ 135.

[327] GTE Petition at 43.

[328] *CPNI Order*, 13 FCC Rcd at 8194, ¶ 191.

[329] Section 64.2009(a) of the Commission's rules states that "Telecommunications carriers must develop and implement software that indicates within the first few lines of the first screen of a customer's service record the CPNI approval status and reference the customer's existing service subscription." 47 C.F.R. § 64.2009(a). *See CPNI Order*, 13 FCC Rcd at 8198, ¶ 198.

[330] Section 64.2009(c) of the Commission's rules requires that: "Telecommunications carriers must maintain an electronic audit mechanism that tracks access to customer accounts, including when a customer's record is opened, by whom, and for what purpose. Carriers must maintain these contact histories for a minimum period of one year." *See CPNI Order*, 13 FCC Rcd at 8198-200, ¶ 199.

[331] *See CPNI Order*, 13 FCC Rcd at 8198-200, ¶¶ 199-202. In the *Clarification Order* the Common Carrier Bureau clarified that carriers are not required to file such certifications with the Commission. *Clarification Order*, 13 FCC Rcd at 12399, ¶ 13. Rather, the *CPNI Order* merely directed carriers to ensure only that these corporate certifications be made publicly available. *Id.* As we noted in the order, the Commission similarly requires

carriers would need time to conform their data systems and operations to comply with the software flags and electronic audit mechanisms required by the Order, we deferred enforcement of those rules until eight months from when the rules became effective: specifically, January 26, 1999.[332]

118. Following the release of the *CPNI Order*, several petitioners sought reconsideration of a variety of issues, including the decision to require carriers to implement the use of flags and audit trails.[333] Other carriers sought reconsideration of the *CPNI Order*'s employee training and discipline requirement in section 64.2009(b) of the Commission's rules, as well as the supervisory review requirement in section 64.2009(d) of the Commission's rules.[334] On September 24, 1998, in response to concerns raised by a number of parties, the Commission ruled in the *Stay Order* that it would not seek enforcement actions against carriers regarding compliance with the CPNI software flagging and audit trail requirements as set forth in 47 C.F.R. Section 64.2009(a) and (c) until six months after the release date of this order on reconsideration.[335] We concluded that it serves the public interest to extend the deadline for the initiation of enforcement of the software flagging and audit trail rules so that the Commission could "consider recent proposals to tailor our requirements more narrowly and to reduce burdens on the industry while serving the purposes of the CPNI rules."[336]

119. On November 9, 1998, PCIA filed a petition for reconsideration of the *Stay Order* requesting that the Commission retract the additional requirement for deployment of systems pending the Commission's reconsideration of the *CPNI Order*.[337] Several parties

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commercial broadcasters to keep publicly available inspection files on site. *CPNI Order*, 13 FCC Rcd at 8199, ¶ 201, n.695 (citing 47 C.F.R. § 73.3526). We likewise require that carriers make these certifications available for public inspection, copying, and/or printing at any time during regular business hours at a centrally located business office of the carrier.

[332] *See CPNI Order*, 13 FCC Rcd at 8200, ¶ 202.

[333] 360° Communications Petition at 12; ALLTEL Petition at 8-9; Ameritech Petition at 8-11; AT&T Petition at 8-18; Bell Atlantic Petition at 22-23; BellSouth Petition at 18-23; Frontier Petition at 3-5; GTE Petition at 41-42; Independent Alliance Petition at 2-8; LCI Petition at 2-6; MCI Petition at 34-43; NTCA Petition at 7-11; Omnipoint Petition at 15-16; Sprint Petition at 2-6; TDS Petition at 11-16; USTA Petition at 9-15.

[334] TDS Petition at 15; USTA Petition at 14.

[335] *Stay Order*, 13 FCC Rcd at 19393, ¶ 6.

[336] *Stay Order*, 13 FCC Rcd at 19392, ¶ 4.

[337] PCIA Petition (filed November 9, 1998).

supported PCIA's petition[338] and PCIA filed a Reply.[339] We deny PCIA's petition, however, as we have granted *infra*, in part, the petitions for reconsideration with respect to the flagging and audit trail requirements.[340] Thus, although new systems implemented prior to the expiration of the stay period will be required to comply with the new rules promulgated in this order, we believe the new rules are significantly less burdensome. We have considered the potential impact of our rules in this area on carriers' year 2000 (Y2K) remedial efforts and their plans to stabilize their networks over the Y2K conversion. We expect, however, that the increased flexibility, reduction in compliance burden and additional time for implementation that we grant here will greatly reduce the risk of such impact.[341] Thus, and in light of the facts before us, we believe that our rules will have no significant detrimental effect on carriers' Y2K efforts. We conclude that it is in the public interest to extend the stay period an additional two months so as not to impede those efforts for carriers that chose to implement electronic safeguards under the modified rules. Accordingly, the Commission will not seek enforcement actions against carriers regarding compliance with sections 64.2009(a) and (c) of the Commission's rules until eight months after the release date of this order on reconsideration.

120. An industry coalition (Coalition) comprised of a combination of thirty-one industry representatives has proposed specific amendments to sections 64.2009(a), 64.2009(c), and 64.2009(e) of the Commission's rules (Coalition Proposal).[342] After consideration of this proposal and other comments in the record, we adopt modifications to our flagging and audit trail requirements as set forth below.

B. Notice

121. In the *NPRM*, we tentatively concluded that "all telecommunications carriers must establish effective safeguards to protect against unauthorized access to CPNI by their

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[338] Ameritech Comments (filed Dec. 10, 1998); BellSouth Comments (filed Dec. 10, 1998); CTIA Comments (filed Dec. 10, 1998); NTCA Comments (filed Dec. 10, 1998).

[339] PCIA Reply (filed Dec. 23, 1998).

[340] *See* discussion *infra* Part VII.D. and E.

[341] *See* discussion *infra* Part VII.C.

[342] Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Celia Nogales, Ameritech (dated January 11, 1999) and attachment. The Commission also received a jointly written letter in support of the Coalition proposal. Letter to Chairman William E. Kennard, Commissioner Furchtgott-Roth, Commissioner Ness, Commissioner Powell, and Commissioner Tristani from CompTel, CTIA, Independent Alliance, ITTA, NTCA, OPASTCO, Rural Cellular Association, Small Business in Telecommunications, and USTA, CC Docket No. 96-115 (filed April 16, 1999).

employees or agents, or by unaffiliated third parties."[343] We further noted that we previously required AT&T, the BOCs, and GTE to implement computerized safeguards and manual file indicators to prevent unauthorized access to CPNI, and sought comment on whether such safeguards should continue to apply to those carriers.[344] The *NPRM* also tentatively concluded that we should not specify safeguard requirements for other carriers, but sought comment on the issue.[345]

122. We reject CompTel's assertion that the Commission failed to give adequate notice of the "systems modifications" announced in the *CPNI Order*[346] because, in fact, the *NPRM* stated that the Commission might require carriers other than AT&T, the BOCs, and GTE to implement computerized safeguards and manual file indicators, and solicited comment on the issue.[347] CompTel further argues that the Commission did not properly notice or receive comment on "the types of computer modifications that are appropriate or on the costs associated with computer modification," and, as such, the Commission should reconsider its computerized flagging and audit trail requirements.[348] As we do, in fact, modify the flagging and audit trail rules on reconsideration to allow carriers to institute non-computerized systems, we grant CompTel's Petition in this regard.[349]

123. We also reject NTCA's argument that our description of the projected reporting, record-keeping, and other compliance requirements of the rule we proposed in the NPRM was inaccurate.[350] As we described *supra*, the NPRM tentatively concluded that we would *not* require carriers other than AT&T, the BOCs, and GTE to implement specified safeguard requirements as those carriers had been required to under *Computer III*. Thus, the NPRM's Initial Regulatory Flexibility Analysis correctly stated that there were no projected reporting, record-keeping, or other compliance requirements for small business entities as a

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[343] *NPRM*, 11 FCC Rcd at 12528, ¶ 35.

[344] *NPRM*, 11 FCC Rcd at 12528, ¶ 35.

[345] *NPRM*, 11 FCC Rcd at 12528-29, ¶ 36.

[346] CompTel Petition at 23. *See also* NTCA Comments at 7-9 (arguing that flagging and audit trail requirements were based upon inadequate record).

[347] *NPRM*, 11 FCC Rcd at 12528-29, ¶ 36.

[348] CompTel Petition at 24.

[349] *See, infra*, Sections VII.D. and E.

[350] NTCA Petition at 8.

result of the NPRM.[351]

C. Evidence of Cost of Compliance

124. When we established the flagging and audit trail requirements in the *CPNI Order*, the evidence before us was that carriers could, with relative ease, modify their systems to accommodate these requirements.[352] Based upon many of the petitions filed on reconsideration, however, it does not appear that all of the relevant facts were before the Commission at that time. Numerous petitioners have now presented evidence that the safeguards we adopted would be costly to implement. For example, AT&T predicts that it will cost $75 million to develop and implement systems to comply with the flagging requirement and over $270 million to comply with the audit trail requirement.[353] BellSouth estimates it will cost at least $75 million to create a computer system to comply with the audit trail requirement.[354] LCI estimates that modification of its systems will cost "many millions of dollars."[355] Sprint estimates the cost of modifying its systems to comply with the audit trail requirements at $19.6 million.[356] Several carriers also warn that the implementation of these systems may interfere with their Year 2000 compliance efforts.[357]

125. A number of parties also present evidence that the safeguard requirements of the CPNI rules are particularly burdensome for small and rural carriers.[358] For example, the Independent Alliance asserts that its members estimate that it will cost between $150,000 and $200,000 to implement the flagging and audit trail requirements.[359] The Independent Alliance provides the example of one carrier that serves 3,600 customers that will have an average cost

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[351] *NPRM*, 11 FCC Rcd at 12534, ¶ 55.

[352] *CPNI Order*, 13 FCC Rcd at 8198, ¶ 198 & n.689; *id.*, at 8198-99, ¶ 199 & n.692.

[353] AT&T Petition at 14.

[354] BellSouth Petition at 21.

[355] LCI Petition at 4.

[356] Sprint Petition at 4.

[357] AT&T Petition at 9; Omnipoint Petition at 15; Sprint Petition at 2. *See* Bell Atlantic Petition at 22.

[358] ALLTEL Petition at 4; Independent Alliance Petition at 2; NTCA Petition at 9; TDS Petition at 16; *see* CenturyTel Reply at 7-10; RCA Reply at 8-10.

[359] Independent Alliance Petition at 7.

of implementation of between $42 and $56 per customer.[360] In support of its request, NTCA cites a poll of its members concerning their current state of technology and the costs associated with implementing the Commission's auditing and tracking requirements. NTCA states that more than 60 per cent of its members responded, and that while 98 percent of the responding rural companies with more than 5,000 access lines have mechanized customer service records, only 73 percent of companies with less than 1,000 access lines do.[361] NTCA points out that of those respondents that are mechanized, less than 10 percent have the ability to add a field to indicate CPNI approval status.[362] NTCA maintains that the estimated cost of adding that field averages out to $50,000 per entity, or $12 per line on average and for the smallest rural telephone companies, $38,500 per entity, or $64 per line.[363] NTCA further states that fewer than 7 percent of the rural telephone companies who responded to the survey have electronic audit capability, and NTCA's members estimate that they would be required to spend between $60,000 and $70,000 for that capability.[364] Finally, TDS asserts that it will cost $630,000 to modify its system for flagging.[365] TDS argues that many of the costs of compliance with the flagging and audit trail requirements will place a heavier burden on small and rural carriers because they cannot be spread across a large customer base.[366]

D. The Flagging Requirement

126. Upon reconsideration, based upon the new evidence before us, we agree with the petitioners that we should modify the flagging requirement promulgated in the *CPNI Order* for all carriers.[367] The goal of the CPNI flagging rule is to ensure that carriers are aware of the status of, and observe, a customer's CPNI approval status prior to any use of that

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[360] Independent Alliance Petition at 7 & n.16.

[361] NTCA Petition at 9.

[362] NTCA Petition at 9.

[363] NTCA Petition at 9.

[364] NTCA Petition at 9.

[365] TDS Petition at 12.

[366] TDS Petition at 16.

[367] Coalition Proposal at 1; 360° Communications Petition at 12; ALLTEL Petition at 8-9; AT&T Petition at 13-15; Bell Atlantic Petition 22-23; Comptel Petition at 22-24; Frontier Petition at 3-5; Independent Alliance Petition at 2-8; LCI Petition at 2-6; NTCA Petition at 7-11; Omnipoint Petition at 15-16; Sprint Petition at 2-6; TDS Petition at 11-16; USTA Petition at 9-15.

customer's CPNI.[368] The Coalition proposes that we modify our rule to require carriers to train their marketing personnel to determine a customer's CPNI status prior to using that customer's CPNI for "out of category" marketing, and to make customer approval status available to such personnel in a readily accessible and easily understandable format.[369] As is only now evident from the new evidence presented on reconsideration, implementation of the flagging rules promulgated in the *CPNI Order* will require significant expenditures of monetary and personnel resources for most carriers, regardless of size. Although we agree in principle that the Coalition's proposal will achieve the goals of the flagging requirements at a substantially reduced cost, we conclude that the Coalition's proposal can be modified to even simpler, less regulatory terms. We find that the carriers are in a better position than the Commission to create individual systems which ensure that their employees check each customer's CPNI approval status prior to any use of that customer's CPNI for out of category marketing. Accordingly, we amend section 64.2009(a) of our rules to state that telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI. This modification will permit all carriers to develop and implement a system that is suitable to, among other things, its unique size, capital resources, culture, and technological capabilities. By way of example, carriers that do not presently keep computerized records need not implement an electronic method of verifying approval status; carriers that already have computerized records could implement flags or adopt procedures whereby they access a separate database to verify approval status; or carriers could develop a combination of computerized and non-computerized systems as they see fit.

E. The Audit Trail Requirement

127. We also agree with the petitioners, based upon the new evidence before us, that we should modify the *CPNI Order's* electronic audit trail requirement.[370] This requirement was broadly intended to track access to a customer's CPNI account, recording whenever

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[368] *See CPNI Order*, 13 FCC Rcd at 8198, ¶ 198.

[369] Coalition Proposal at 1. The Coalition's proposal for section 64.009(a) is as follows:

> Each carrier shall establish guidelines that direct its marketing personnel to determine a customer's CPNI approval and service subscription status prior to the use of CPNI for any offering outside of the service category (i.e., local, interexchange, and CMRS) to which the customer subscribes with that carrier. The carrier shall make such approval and status information available, either electronically or in some other manner, to marketing personnel in a readily accessible and easily understandable format.

[370] Coalition Proposal at 2; Ameritech Petition at 8-11; AT&T Petition at 8-13, 15-17; Bell Atlantic Petition 22-23; BellSouth Petition at 18-23; Comptel Petition at 22-24; Frontier Petition at 3-5; GTE Petition at 41-42; Independent Alliance Petition at 2-8; LCI Petition at 2-6; MCI Petition at 34-43; NTCA Petition at 7-11; Omnipoint Petition at 15-16; Sprint Petition at 2-6; TDS Petition at 11-16; USTA Petition at 9-15.

customer records are opened, by whom, and for what purpose.[371] As AT&T points out, the *CPNI Order's* electronic audit trail requirement would generate "massive" data storage requirements at great cost.[372] As it is already incumbent upon all carriers to ensure that CPNI is not misused and that our rules regarding the use of CPNI are not violated we conclude that, on balance, such a potentially costly and burdensome rule does not justify its benefit. As an alternative to the *CPNI Order's* electronic audit trail requirement, the Coalition has proposed that we require the creation of such a record, but only with respect to "marketing campaigns."[373] We find that the Coalition proposal is too narrow because, as MCI noted in an *ex parte* meeting with the Common Carrier Bureau, many carriers distinguish between "sales" and "marketing."[374] We determine that carriers must maintain a record, electronically or in some other manner, of their sales and marketing campaigns that use CPNI. The record must include a description of each campaign, the specific CPNI that was used in the campaign, the date and purpose of the campaign, and what products or services were offered as part of the campaign. We will also require carriers to retain the record for a minimum of one year. We amend section 64.2009(c) accordingly.

F. The Corporate Officer Certification

128. The Coalition also requests that we amend the Officer Certification rule to eliminate the requirement that the corporate officer signing the certification have personal knowledge that the carrier is in compliance with the Commission's CPNI rules.[375] This we decline to do. Our revisions of the flagging and audit trail requirements in this order will

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[371] *CPNI Order*, 13 FCC Rcd at 8198-99, ¶ 199.

[372] Letter from Judy Sello, Senior Attorney, AT&T to Carol Mattey, Chief, Policy & Program Planning Division, Common Carrier Bureau, dated January 12, 1999.

[373] Coalition Proposal at 2. The Coalition proposal for section 64.2009(c) is as follows:

> Each carrier shall maintain a file, electronically or in some other manner, of its marketing campaigns that use CPNI, that includes a description of the campaign and the CPNI that was used in the campaign, its date and purpose, and what products or services were offered as part of the campaign. The file must be kept for a minimum of one year.

[374] MCI January 12, 1999 *Ex Parte*.

[375] Coalition Proposal at 2. The Coalition proposes the following modification of section 64.2009(e):

> A telecommunications carrier must have an officer, as an agent of the carrier, sign a compliance certificate on an annual basis that the carrier is in compliance with the rules in this subpart. A statement explaining how the carrier is in compliance with the rules in this subpart must accompany the certificate.

allow telecommunications carriers more flexibility in determining how they will ensure their compliance with our CPNI rules. This flexibility puts the responsibility squarely on the carriers to ensure their compliance. This flexibility, and its concurrent responsibility, requires that some officer of the carrier have personal knowledge that the scheme designed by the carrier is adequate and complies with our CPNI rules. Because neither the petitioners nor the Coalition have persuaded us that personal knowledge on the part of an officer is unnecessary, we will not omit that requirement from our rule. We will, however, amend the rule to omit the word "corporate" because, as some parties explain, not all carriers are organized as corporations.[376]

129. We agree with CenturyTel's observation, however, that section 64.2009(e) of our rules, as currently written, requires carrier certification of compliance with all of our CPNI rules, a statement which may not necessarily be true.[377] Therefore, we will also amend Section 64.2009(e) to require that telecommunications carriers have an officer, as an agent of the carrier, sign a compliance certificate on an annual basis stating that the operating procedure established by the carrier *is or is not* in compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate detailing how the carrier's operating procedure is and/or is not in compliance.[378]

G. Other Safeguard Provisions

130. Parties also seek reconsideration of other safeguard provisions.[379] USTA seeks reconsideration of the *CPNI Order*'s employee training and discipline requirements in section 64.2009(b) of the Commission's rules, as well as the supervisory review requirement in section 64.2009(d) of the Commission's rules.[380] USTA argues that these requirements are "unnecessary" and misplace the focus on how, rather than whether, carriers are complying with section 222.[381] TDS requests reconsideration of the training requirement alone.[382] TDS asserts, among other things, that even if the flagging and audit trail requirements were not

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[376] Letter to Carol Mattey, Chief, FCC Common Carrier Bureau, Policy & Program Planning Division, from Judy Sello, AT&T at 3 (dated January 12, 1999) (explaining Coalition Proposal).

[377] CenturyTel Comments at 10.

[378] We also decline to adopt the Coalition's request for clarification regarding what constitutes a foundation for the officer certification. Section 64.2009(e) as amended details what the officer must certify.

[379] TDS Petition at 15; USTA Petition at 14.

[380] USTA Petition at 14.

[381] USTA Petition at 15.

[382] TDS Petition at 15.

required, detailed training would be "essential and difficult because of the complexity of the CPNI information use rules."[383] In other words, both argue that these rules are unduly burdensome. We do not agree. As we acknowledged in the *CPNI Order*, these rules "will impose some additional burdens on carriers, particularly carriers not previously subject to our *Computer III* CPNI requirements."[384] In light of the important role these rules play in safeguarding the proper use of CPNI, however, we are not persuaded that these rules are so burdensome that they warrant modification. Moreover, as we have taken steps on reconsideration to allow carriers to decide for themselves how to implement the flagging and audit trail rules, the rules are now even less burdensome. It is, in fact, the continued application of the employees training and discipline rules, and the officer certification requirement, that permits us to make the substantial modifications of the flagging and audit trail requirements on reconsideration. Thus, we conclude the remaining requirements in section 64.2009 are reasonable as presently written.

H. Petitions for Forbearance

131. We deny both as moot NTCA and PCIA's petitions for forbearance from enforcement of the audit trail and flagging rules.[385] As we described in detail *supra*, section 10 of the Act requires the Commission to forbear from regulation when: (1) enforcement is not necessary to ensure that the carrier's charges and practices are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.[386] Both PCIA and NTCA premise their forbearance arguments upon the fact that the flagging and audit trail requirements, as detailed in the *CPNI Order*, require the implementation of electronic safeguards.[387] For example, among other things, PCIA asserts that flagging and audit trail requirements will require unreasonable expense because they require "re-engineered" computer systems, and create additional Year 2000 compliance efforts for carriers.[388] NTCA argues that the costs associated with implementing the computerized solution required by our old flagging and audit trail rules will require "outrageous" expense, and asserts that there are "far less expensive, less burdensome, and less

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[383] TDS Petition at 15.

[384] *CPNI Order*, 13 FCC Rcd at 8196, ¶ 194.

[385] NTCA Petition at 7-11 (requesting forbearance for all rural carriers); PCIA Petition for Forbearance at 16-20 (requesting forbearance for all carriers).

[386] *See supra*, Part V.A.3.

[387] NTCA Petition at 10.

[388] PCIA Petition for Forbearance at 18-20.

complicated ways of achieving the [rules'] goal."[389] As we have explained above, based upon the new evidence the parties presented on reconsideration, we agree with both NTCA and PCIA that the rules we promulgated in the *CPNI Order* are unduly burdensome. We deny these forbearance petitions, however, because we conclude that the revised flagging and audit trail requirements resolve NTCA and PCIA's criticisms of the former rules and the basis for their forbearance requests. Under our new rules carriers, including NTCA and PCIA members, may establish non-computerized systems of their own design to comply with our requirements.

I. Small and Rural Carriers

132. We recognize, in light of the new evidence presented to the Commission, that the flagging and audit trail requirements promulgated in the *CPNI Order* might have a disparate impact on rural and small carriers. Our modification of the flagging and audit trail requirements in this order, however, effectively moots the requests we received from the parties seeking special treatment for small and rural carriers with respect to these requirements.[390] In particular, under the amended rules, carriers are not required to maintain flagging and audit capabilities in electronic format. Rather, the amended rules leave it to the carriers' discretion to determine what sort of system is best for their circumstances. Thus, carriers whose records are not presently maintained in electronic form are not required to implement electronic systems if they do not wish to do so. We deny, therefore, the Independent Alliance's petition to exempt small and rural carriers from the provisions of sections 64.2009(a) and (c) because we have amended our rules to accommodate, in part, the concerns of small and rural carriers.[391] Likewise, we deny NTCA's request that rural telecommunications companies should be eligible for a blanket waiver of the flagging and audit trail provisions,[392] and TDS's request for reconsideration of the flagging and tagging rules for small and mid-sized carriers, for the same reason.[393] Finally, on the same basis, we reject ALLTEL's request that we reconsider the application of the "enforcement time frames and other requirements to rural and small carriers."[394]

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[389] NTCA Petition at 8-10.

[390] ALLTEL Petition at 8-9; Independent Alliance Petition at 2-9; NTCA Petition at 11; TDS Petition at 11-16. *See also* CenturyTel Reply at 5.

[391] Independent Alliance Petition at 2-9.

[392] NTCA Petition at 11.

[393] TDS Petition at 11-16.

[394] ALLTEL Petition at 8-9. We note, in addition, that we have extended the time frame for enforcement of the flagging and audit trail requirements to eight months from the release of this order. *See* discussion *supra* Part VII.A.

J. Adequate Cost Recovery

133. We deny TDS' request that the Commission provide a mechanism, in the form of a "nationwide averaged [and] clearly identified flat charge on all customers," to recover the costs that carriers will incur complying with section 222, the *CPNI Order*, and the Commission's rules.[395] TDS asserts, without providing any estimation of costs, that compliance costs "are likely to be staggering."[396] TDS bases its estimation of the cost of compliance primarily upon the software flag, audit trail, other record keeping, and training requirements in the *CPNI Order*.[397] As we have now amended our rules to allow carriers the freedom to implement these safeguards in a more effective and flexible manner, we believe that carrier costs will be significantly reduced from the costs estimated by carriers subsequent to the *CPNI Order*. Accordingly, we reject TDS's request for a separate cost recovery mechanism at this time.

K. Enforcement of CPNI Obligations

134. In this Order, we have amended our rules to reflect a deregulatory approach which leaves many of the specific details of compliance to the carriers. However, we intend to enforce the rules, as amended, zealously. We expect carriers to protect the confidentiality of the CPNI in their possession in accordance with our rules. Carriers will be subject to penalties for improper use of CPNI.[398] Moreover, failure to develop and implement a compliance plan to safeguard CPNI consistent with our rules will form a separate basis for liability.[399] We also note that we will address, in a separate order, the enforcement and compliance issues raised in response to the *FNPRM*.[400]

VIII. SECTION 222 AND OTHER ACT PROVISIONS

A. Section 222 and Section 272

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[395] TDS Petition at 16-17.

[396] TDS Petition at 17.

[397] TDS Petition at 16.

[398] 47 C.F.R. § 64.2005, 64.2007.

[399] 47 C.F.R. § 64.2009.

[400] *CPNI Order*, 13 FCC Rcd at 8200-202, ¶ 203-207 (we sought comment, *inter alia*, as whether the adoption of additional enforcement mechanisms are necessary to ensure carrier compliance or encourage appropriate discharge of a carrier's duty under section 222, such as compensation to other carriers harmed by anticompetitive behavior as a result of misuse of proprietary information).

1. Background

135. Section 272(c)(1) states that, "[i]n its dealings with its [section 272 affiliates], a Bell operating company . . . may not discriminate between the company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."[401] The Commission concluded in the *Non-Accounting Safeguards Order* that: (1) the term "information" in section 272(c)(1) includes CPNI; and (2) the BOCs must comply with the requirements of both sections 222 and 272(c)(1).[402] The Commission, however, declined to address the parties' other arguments regarding the interplay between section 272(c)(1) and section 222 to avoid prejudging issues that would be addressed in the *CPNI Order*.[403] The Commission also declined to address the parties' arguments regarding the interplay between section 222 and section 272(g), which permits certain joint marketing between a BOC and its section 272 affiliate.[404] The Commission emphasized, however, that, if a BOC markets or sells the services of its section 272 affiliate pursuant to section 272(g), it must comply with the statutory requirements of section 222 and any rules promulgated thereunder.[405]

136. In the *CPNI Order* the Commission overruled the *Non-Accounting Safeguards Order*, in part, concluding that the most reasonable interpretation of the interplay between sections 222 and 272 is that the latter does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates when they share information with their section 272 affiliates according to the requirements of section 222.[406] The Commission reached this conclusion only after recognizing an apparent conflict between sections 222 and 272.[407] We noted in the *CPNI Order* that, on the one hand, certain parties argued that under the principle of statutory construction the "specific governs the general," and that section 222 specifically governs the use and protection of CPNI, but section 272 only refers to "information" generally.[408] As such, they claimed that section 222 should control section

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401 47 U.S.C. § 272(c)(1).

402 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22010, ¶ 222.

403 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22010, ¶ 222.

404 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22050, ¶ 300.

405 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22050, ¶ 300.

406 *CPNI Order*, 13 FCC Rcd at 8174-75, 8179, ¶ 160, 169.

407 *CPNI Order*, 13 FCC Rcd at 8174, ¶ 158.

408 *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

272.[409] On the other hand, under the same principle of construction, other parties argued that section 272 specifically governs the BOCs' sharing of information with affiliates, whereas section 222 generally relates to all carriers.[410] Therefore, they asserted, section 272 should control section 222.[411] Because either interpretation is plausible, it was left to the Commission to resolve the tension between these provisions, and to formulate the interpretation that, in the Commission's judgment, best furthers the policies of both provisions and the statutory design.[412] We determine that interpreting section 272 to impose no additional obligations on the BOCs when they share CPNI with their section 272 affiliates according to the requirements of section 222 most reasonably reconciles the goals of these two principles.[413]

2. Discussion

137. We affirm our conclusion in the *CPNI Order* that the most reasonable interpretation of the interplay of sections 222 and 272 is that section 272 does not impose any additional obligations on the BOCs when they share CPNI with their section 272 affiliates.[414] We disagree with the parties that argue that we misinterpreted the relationship between section 222 and 272. A number of carriers assert that section 272 sets out additional requirements for BOCs with respect to the transfer of CPNI to section 272 affiliates than are required by section 222 alone.[415] For the same reasons described in the *CPNI Order*, however, we conclude that our prior interpretation of the relationship between sections 222 and 272 is correct.[416]

138. At the outset, we reject MCI's argument that there was not adequate notice that the Commission might reverse its conclusion in the *Non-Accounting Safeguards Order* relating

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[409] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

[410] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

[411] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

[412] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

[413] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

[414] *CPNI Order*, 13 FCC Rcd at 8179, ¶ 169.

[415] AT&T Petition at 23-24; CompTel Petition at 2-10; MCI Petition at 6-21; Sprint Petition at 6-8; Intermedia Comments at 6-9; WorldCom Comments at 3-7; TRA Comments at 2-5.

[416] Ameritech Comments at 9-11; Bell Atlantic Comments at 2-5; BellSouth Comments at 14-16; SBC Comments at 9-14; U S WEST Comments at 6-10.

to CPNI.[417] On February 20, 1997, in a *Public Notice* issued subsequent to the *Non-Accounting Safeguards Order*, but prior to the *CPNI Order*, the Commission sought comment on specific questions for the CPNI rulemaking proceeding.[418] Although the *Public Notice* did not specifically seek comment on whether the *Non-Accounting Safeguards Order*'s conclusion should be reversed, it did pose a series of detailed questions relating to the interplay between sections 222 and 272. For example, the *Public Notice* inquired whether:

> . . . the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of . . . services . . . and information . . ." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

Parties were, therefore, on notice that we might reconsider our conclusion concerning the relationship between sections 222 and 272. Accordingly, we affirm our conclusion that notice was adequate.

139. We further disagree with MCI's claim that the Commission's "approach" is flawed by its "failure to analyze MCI's proposed nondiscrimination rule on its own terms."[419] MCI asserts without support that it previously proposed—presumably in its comments or reply comments to the *NPRM*—that section 272(c)(1) requires that BOCs that obtain a customer's approval to use his or her CPNI on behalf of a section 272 affiliate or to disclose CPNI to a section 272 affiliate must likewise provide customer CPNI to any third party that can demonstrate that it has also obtained that customer's oral approval.[420] MCI contends that the Commission "admitted" that MCI's proposal is consistent with section 222, but improperly rejected the proposal.[421] Although we addressed the substance of this argument in the *CPNI Order*, it is not clear that it was MCI that raised the argument at that time. In any case, MCI's contention apparently refers to our conclusion that requiring BOCs to disclose CPNI to unrelated entities upon oral customer approval when they share CPNI with their section 272

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[417] MCI Petition at 6-7.

[418] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Public Notice, CC Docket No. 096-115, DA 97-385 (rel. Feb. 20, 1997) (*Public Notice*).

[419] MCI Petition at 8.

[420] MCI Petition at 2, 8-10.

[421] MCI Petition at 9.

affiliates upon oral approval is not necessarily inconsistent with section 222.[422] MCI fails to mention, however, that we further concluded that if that aspect of section 272(c)(1) was applicable, there would be no principled basis upon which not to impose other obligations required by that section. We concluded that if section 272(c)(1)'s non-discrimination obligation applies to the form of customer approval then it would also apply when BOCs solicit customer approval to share CPNI with their 272 affiliates.[423] In other words, section 272(c)(1) would seemingly require BOCs to solicit customer authorizations on behalf of other carriers when soliciting for such authorizations on behalf of their own BOC affiliates. We further concluded that such a requirement would present insurmountable hurdles for BOC compliance with section 222.[424] We noted that requiring BOCs to solicit approval for unspecified "all other" entities would neither constitute effective notice nor informed approval as customers cannot knowingly approve release of their CPNI unless and until they are made aware of the identity of the party that will receive the CPNI.[425] Alternatively, we also noted, it would be difficult as a practical matter for BOCs to provide specific notice, and obtain informed approval, for each entity that so requests.[426] MCI is incorrect, therefore, that we failed to analyze this proposal on its own terms. We did so and rejected it in the *CPNI Order*. Accordingly, we affirm our previous conclusion based upon our prior reasoning.

140. We also reject MCI and TRA's argument that the "except as required by law" clause in section 222(c)(1) encompasses, at least in part, section 272(c)(1).[427] Both parties conclude that as a result of their interpretation of this clause there is no conflict between sections 222 and 272, and that section 272 trumps section 222.[428] Bell Atlantic and SBC oppose this interpretation.[429] SBC and Bell Atlantic respectively counter that Congress intended the "except required by law" clause as an exception (1) for disclosures pursuant to court order,[430] and (2) to law enforcement agencies, regulators, and other public officials as

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[422] *CPNI Order*, 13 FCC Rcd at 8176-77, ¶ 163.

[423] *CPNI Order*, 13 FCC Rcd at 8176-77, ¶ 163.

[424] *CPNI Order*, 13 FCC Rcd at 8176-77, ¶ 163.

[425] *CPNI Order*, 13 FCC Rcd at 8177, ¶ 163.

[426] *CPNI Order*, 13 FCC Rcd at 8177, ¶ 163.

[427] MCI Petition at 7-8; TRA Comments at 3.

[428] MCI Petition at 7-8; TRA Comments at 3.

[429] Bell Atlantic Comments at 3-4; SBC Comments at 11.

[430] SBC Comments at 11.

required by subpoena regulation, statute, or other legal process.[431] Bell Atlantic also argues that if Congress meant to include section 272 as an exception to section 222 then it would have specifically included a reference to the section as it has done in other parts of the Act.[432] Although SBC and Bell Atlantic have proposed possible interpretations of this clause, we do not agree that those are the only interpretations. Unfortunately, the legislative history provides little guidance either way,[433] and MCI and TRA's position is also plausible. Thus, we conclude that the meaning of this clause is ambiguous. As such, we must interpret this clause in a way that best reflects the statutory design and furthers the policies of the 1996 Act. We conclude, for the same reasons as those we previously described in the *CPNI Order*,[434] that the "except as required by law" clause does not encompass section 272.

141. We affirm the *CPNI Order*'s conclusion that the term "information" in section 272(c)(1) does not include CPNI[435] despite CompTel and Intermedia's assertion that such an interpretation is contrary to the plain meaning of the Act and should be reconsidered. They argue that where Congress intended to limit the term "information" it did so explicitly, but the term "information" in section 272(c)(1) is not qualified or limited in that way.[436] Moreover, both argue that the fact that section 272(g)(3) contains the only exception to section 272(c) specifically created by Congress adds weight to its broad construction of the term "information" in section 272(c)(1). Finally, Intermedia argues that the definition of CPNI as "*information* that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service . . ." indicates that CPNI falls squarely within the category of "information" in section 272(c)(1). Taken in context of the entire Act, it is not readily apparent that the meaning of "information" in section 272 necessarily includes CPNI. As we stated in the *CPNI Order*, the sections read together could also indicate that section

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[431] Bell Atlantic Comments at 3.

[432] Bell Atlantic Comments at 4 & n.2.

[433] The only related reference in the legislative history is a statement in the Joint Explanatory Statement's description of the Senate bill, and not the Conference agreement, which states as follows:

> [i]n general, a BOC may not share with anyone customer-specific proprietary information without the consent of the person to whom it relates. Exceptions to this general rule permit disclosure in response to a court order or to initiate, render, bill and collect for telecommunications services.

Joint Explanatory Statement at 203.

[434] *CPNI Order*, 13 FCC Rcd at 8175-79, ¶ 161-69.

[435] *CPNI Order*, 13 FCC Rcd at 8171-72, 8174, ¶ 154, 158.

[436] CompTel Petition at 4-5.

222's specific definition of CPNI is meant to govern the more general use of the term "information" in section 272(c)(1).[437]

142. While the legislative history is silent about the meaning of "information" in section 272(c)(1), the structure of the Act indicates strongly that the provision is susceptible to differing meanings. Indeed, as the courts have cautioned, the Commission is bound to move beyond dictionary meanings of terms and to consider other possible interpretations, assess statutory objectives, weigh congressional policy, and apply our expertise in telecommunications in determining the meaning of provisions.[438] In this instance, we believe that the structure of the Act belies petitioners' contention that the term "information" has a plain meaning that encompasses CPNI. In enacting section 222, Congress carved out very specific restrictions governing consumer privacy in CPNI and consolidated those restrictions in a single, comprehensive provision. We believe that the specific requirements governing CPNI use are contained in that section and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating those constraints. As a practical matter, the interpretation proffered by petitioners would bar BOCs from sharing CPNI with their affiliates: the burden imposed by the nondiscrimination requirements would, in this context, pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown.[439] We do not believe that is what Congress envisioned when it enacted sections 222 and 272. Rather, as we concluded in the *CPNI Order*, we find it a more reasonable interpretation of the statute to conclude that section 222 contemplates a sharing of CPNI among all affiliates (whether BOCs or others), consistent with customer expectations that related entities will share information so as to offer services best tailored to customers' needs.[440] For these reasons, we find that the "plain meaning" argument raised by Comptel and Intermedia is not persuasive, and further that their meaning is not the one Congress most likely intended. Therefore, we affirm our previous conclusion.

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[437] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160. 47 U.S.C. § 222(f)(1) defines CPNI, in part, as:

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier . . ..

[438] *See Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997).

[439] *CPNI Order*, 13 FCC Rcd at 8174, ¶ 159.

[440] *CPNI Order*, 13 FCC Rcd at 8175, ¶ 160.

143. In addition, we are not persuaded by CompTel's assertion that there is no indication that section 222 was intended to trump section 272 because the Commission previously recognized, in the *First Report and Order*, that section 222's obligations are not exclusive.[441] We held in the *First Report and Order* that customer authorization pursuant to section 222(c)(1) does not extend to any CPNI subject to the Section 275(d) prohibition.[442] Section 275(d) prohibits local exchange carriers from the using or recording "in any fashion the occurrence or contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of such local exchange carrier, or any other entity."[443] Thus, section 275(d) specifically describes a subset of CPNI, namely information concerning the occurrence of calls received by alarm monitoring service providers, that may not be used by local exchange carriers for marketing of alarm monitoring services on their own behalf or on behalf of any other entity.[444] Because Congress unambiguously prohibited the use of such CPNI in section 275(d), we concluded that the specific prohibition in section 275(d) controls the general CPNI rules described in section 222.[445] This stands in stark contrast to the difficult task of reconciling sections 222 and 272.[446]

144. Moreover, we do not agree with WorldCom's assertion that the Commission ignored section 272(b)(1). WorldCom argues that Section 272(b)(1) requires that a section 272 affiliate "operate independently from the Bell operating company," and prohibits the section 272 affiliate from providing or coordinating any of its CPNI-related functions with the BOC when read in conjunction with section 222.[447] WorldCom apparently believes that the "operate independently" requirement of section 272(b)(1), when read in conjunction with section 222, demonstrates Congressional intent to establish a statutory dichotomy between CPNI and CPNI-related services used, disclosed, or accessed by other unaffiliated entities.[448] WorldCom is incorrect, however, that we "ignored" section 272(b)(1). Rather, the

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[441] CompTel Petition at 6.

[442] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers*, Report and Order, CC Docket No. 96-115, 11 FCC Rcd 9553, 9557, ¶ 9 (*First Report and Order*).

[443] 47 U.S.C. § 275(d).

[444] 47 U.S.C. § 275(d).

[445] *See First Report and Order*, 11 FCC Rcd at 9557, ¶ 9.

[446] *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

[447] WorldCom Comments at 6.

[448] WorldCom Comments at 6.

Commission directly addressed this argument in the *CPNI Order*.[449] Thus, we deny reconsideration on this basis as WorldCom has not presented any new arguments or facts we did not already consider.

145. Finally, several parties also argue that our interpretation of the interplay of sections 222 and 272 gives BOC affiliates an unfair competitive advantage over other competitors.[450] These parties raise no new arguments or facts on reconsideration of this point that we did not already consider. We previously identified in detail specific mechanisms in section 222 that address such competitive concerns.[451] We therefore deny these parties' requests for reconsideration of this conclusion.

B. Disclosure of Non-CPNI Information Pursuant to Section 272

146. The Commission noted in a footnote in the *CPNI Order* that BOC non-discrimination obligations under section 272 would apply to the sharing of all other information and services with their section 272 affiliates.[452] The Common Carrier Bureau further concluded in the *Clarification Order* that a customer's name, address, and telephone number are not CPNI.[453] The Bureau reasoned that "[i]f the definition of CPNI included a customer's name, address, and telephone number, a carrier would be prohibited from using its business records to contact any of its customers to market any new service that falls outside the scope of the existing service relationship with those customers.[454]

147. We agree with the Common Carrier Bureau's clarification and adopt its reasoning and conclusion as our own. Accordingly, we grant MCI's request that we clarify that a customer's name, address, and telephone number are "information" for purposes of section 272(c)(1), and if a BOC makes such information available to its affiliate, then it must

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[449] *CPNI Order*, 13 FCC Rcd at 8179, ¶ 168 & n.582.

[450] AT&T Petition at 23-24; CompTel Petition at 7-10; Sprint Petition at 7; Intermedia Comments at 9.

[451] *CPNI Order*, 13 FCC Rcd at 8177-78, ¶ 164-67.

[452] *CPNI Order*, 13 FCC Rcd at 8177, ¶ 164, n.573 ("We note, however, that our interpretation does not render the BOCs' nondiscrimination obligations as to 'information' or 'services' in section 272 meaningless. The requirement would apply to the BOCs' sharing of all other information (i.e., non-CPNI) and services with their section 272 affiliates.").

[453] *Clarification Order*, 13 FCC Rcd at 12396-97, ¶ 9.

[454] *Clarification Order*, 13 FCC Rcd at 12396-97, ¶ 9.

make that information available to non-affiliated entities.[455] We reject U S WEST's bald assertion that requiring disclosure of this information would raise "serious constitutional issues, such as those already presented by U S WEST." U S WEST does not explain which constitutional issues it considers implicated by this determination. To the extent that U S WEST means to incorporate any constitutional arguments raised by U S WEST and addressed in the *CPNI Order*, we reject those arguments for the reasons set forth in that order.[456] We also deny U S WEST's request that the Commission hold that section 222 controls all issues involving customer information, rather than issues pertaining to CPNI.[457] We are not persuaded that any portion of section 222 indicates that Congress intended such a result, nor does U S WEST delineate any portion of section 222 that would support its argument. Finally, we reject SBC's argument that, although this information is not CPNI, it is an activity that is encompassed within the joint marketing exception in section 272(g)(3) of the 1996 Act because "use of lists of such information is an integral part of—indeed, is likely the first step of—the overall marketing of long distance services."[458] Such a consideration is outside the purview of this proceeding.

148. MCI also argues that the Commission should find that a customer's PIC choice and PIC-freeze status are not CPNI as defined in section 222(f)(1).[459] Several carriers oppose MCI's argument.[460] MCI asserts that the identity of a customer's carrier is not information concerning the "type" of service under section 222(f)(1)(A) and is not information "pertaining to" the service itself under section 222(f)(1)(B) despite the fact that the customer's PIC choice appears on the customer's telephone bill.[461] MCI argues that PIC-freeze information does not meet the definition of CPNI for like reasons. We are not persuaded by MCI's statutory interpretation. We conclude that a customer's PIC choice falls squarely within the definition

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[455] MCI Petition at 13. We note, as the Bureau did, that our conclusion is not intended to override any other obligations carriers may have with respect to customer information, such as those imposed under section 64.1201 of the Commission's rules relating to carrier disclosure of customer billing names and addresses. *See Clarification Order*, 13 FCC Rcd at 12396, ¶ 9, n.20.

[456] U S WEST Comments at 14.

[457] U S WEST Comments at 14-15.

[458] SBC Comments at 14.

[459] MCI Petition at 14.

[460] *E.g.*, Bell Atlantic Comments at 5-6; GTE Comments at 23-24; U S WEST Comments at 23-24.

[461] MCI Petition at 16. MCI further discloses that it has argued in its Comments to the *FNPRM* in the *CPNI Order* that a customer's PIC choice and PIC changes are carrier proprietary information of the interexchange carrier. *Id.* As such, MCI argues, a local exchange carrier may not use such information for marketing purposes. *Id.* We decline to address this argument in this proceeding because it is more appropriately left to the *FNPRM*.

of CPNI set out in both sections 222(f)(1)(A) and (B), and that PIC-freeze information meets the requirements of section 222(f)(1)(A). Finally, we agree with GTE that this result is consistent with the privacy goals set out by Congress in section 222.[462]

C. Section 222 and Section 254

149. CenturyTel also argues that restricting the use of CPNI in marketing enhanced services and CPE to existing customers in rural exchanges is inconsistent with Universal Service provisions of the Act.[463] CenturyTel argues that section 222(c) of the Act permits a carrier to use CPNI in the provision of new service if "...required by law or with approval of the customer... ." CenturyTel further argues that the Commission failed to include the "required by law" exception to the restrictions on the use of CPNI, and only included the "customer approval" exception in its rules[464]. CenturyTel maintains that the Commission must harmonize the two provisions of law by inserting the "required by law" exception to the CPNI rules, and recognizing that Congress's Universal Service requirements provide an additional exception to the CPNI restrictions.[465] CenturyTel maintains that the Commission should permit rural telephone companies, as defined in section 153(37) of the Act to use, disclose, or permit access to CPNI to market to an existing customer in rural areas served by the rural telephone company categories of service to which that customer does not already subscribe.[466]

150. NTCA makes a similar argument. NTCA argues that the Commission is under a statutory mandate to promote the delivery of advanced telecommunications capability to rural areas on a reasonable and timely basis.[467] NTCA points out that very often in a rural area, there is only one provider of telecommunications service, and the carrier does not benefit from an unfair competitive advantage by promoting new services or equipment to its subscribers.[468] NTCA therefore requests that the Commission reconsider its "total service approach", stating that it disadvantages small LECs seeking to expand the array of services rural customers demand. TDS, in addition, asserts that restrictions on the use of CPNI to market information services run counter to the goal of affordable telecommunications and

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[462] GTE Comments at 24 ("Given the privacy and consumer protection interests at stake, PIC and PIC-freeze information is precisely the type of information that customers want to be kept confidential from third parties.").

[463] CenturyTel Reply at 5.

[464] *Id.*

[465] *Id.* at 6.

[466] *Id.* at 7.

[467] NTCA Petition at 4.

[468] *Id.*

information services of section 254(b)(3) of the Act.[469]

151. We disagree with the arguments made by CenturyTel and NTCA. As stated in Section V.A of this Order, we affirm the "total service approach" for all carriers. We find no reason to impose different notification requirements on large and small carriers. As we stated in the *CPNI Order*, concerns regarding customer privacy are the same irrespective of the carrier's size or identity.[470] Further to the extent that CenturyTel and NTCA are requesting to use CPNI, without customer approval, to market CPE and certain information services, those requests have been granted above.[471] We also disagree with CenturyTel and NTCA's argument that section 254 requires the use of CPNI to allow rural carriers to implement Congress' Universal Service standards. Section 254 envisions that rural carriers would introduce and make available new technology to all of its customers. The CPNI rules in no way discourage rural carriers from doing that. In fact, one could argue that some of the CPNI rules require a carrier to make all of its customers aware of such new technology rather than using CPNI to pick and choose which customers to market the new technology to. The basis of CenturyTel and NTCA's arguments, however, is that they do not want to market the new technology to all of its customers. They want to make it available only to certain customers that they select by using their customers' CPNI. We fail to see how section 254 requires this outcome.

D. Application of Nondiscrimination Rules Under Sections 201(b) and 202(a)

152. We reject MCI's argument that the nondiscrimination requirement described in section 272 should be applied to all ILECs through the requirements of sections 201(b) and 202(a).[472] MCI asserts that "the leveraging of dominance in one telecommunications market in order to gain a competitive advantage in another telecommunications market is an unreasonable and unjust practice in violation of Section 201(b)."[473] MCI further asserts that it is a violation of section 202(a) "[f]or an ILEC to favor its own affiliate with local service CPNI and other customer-specific information that is not made available to competitors" as such an action would provide an "undue or unreasonable preference or advantage" to such an

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[469] TDS Petition at 7.

[470] *CPNI Order*, 13 FCC Rcd at 8161, ¶ 134.

[471] *See* Part V.B, *supra*.

[472] MCI Petition at 18-21. *See also* LCI Petition at 15; AT&T Reply at 22-23 & n. 24. Several parties oppose MCI's proposition. GTE Comments at 20-22; Sprint Comments at 6-8; Independent Alliance Reply at 8-9.

[473] MCI Petition at 18-19.

affiliate.[474] Thus, MCI concludes sections 201(b) and 202(a) require that an ILEC, including BOCs, must electronically transmit a customer's CPNI to any other entity that has obtained that customer's oral approval upon the ILEC's use of such CPNI for marketing on behalf of its interexchange affiliate or disclosure of the CPNI to its affiliate.[475]

153. We agree with GTE that there is no justification to conclude, as a matter of statutory construction, that the broad non-discrimination requirements of these sections impose a specific disclosure obligation on ILEC use of CPNI.[476] In any case, the same privacy concerns we identified in our discussion of the relationship between sections 222 and 272 apply here equally. For instance, requiring the disclosure of CPNI to other companies to maintain competitive neutrality would defeat, rather than protect, customers' privacy expectations and control over their own CPNI.[477] We conclude that the specific consumer privacy and consumer choice protections established in section 222 supersede the general protections identified in sections 201(b) and 202(a). Thus, we are not persuaded that section 201(b) or section 202(a) require the result MCI seeks. Accordingly, we reject MCI's request.

IX. OTHER ISSUES

A. Status of Customer Rewards Program

154. Section 64.2005(b) of the Commission's Rules prohibits a telecommunications carrier from using, disclosing, or permitting access to CPNI to market to a customer, without customer approval, service offerings that are within a category of service to which the customer does *not* already subscribe.

155. Omnipoint and Vanguard contend that when a carrier provides free rewards, such as free equipment, for the purpose of retaining its accounts, the prohibition in section 64.2005(b) should not apply because (1) the customer subscribes to the service for which the reward is provided; and (2) the reward is free, and therefore is not "marketed."[478] Omnipoint and Vanguard request clarification because they claim that carriers are more likely to offer rewards if they are able to target them to high-volume or long-term customers, and if carriers

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[474] MCI Petition at 19.

[475] MCI Petition at 19.

[476] GTE Comments at 21.

[477] *CPNI Order*, 13 FCC Rcd at 8176, ¶ 162.

[478] Omnipoint Petition at 19; Omnipoint Reply at 8; Vanguard Petition at 15-16.

do not need to seek customer approval.[479] No party has objected to this proposal.

156. We agree with Omnipoint and Vanguard that, where a carrier uses CPNI to provide free rewards to its customer, such use of CPNI is within the scope of the carrier-customer relationship. As such, the use of the CPNI is limited to the existing service relationship between the carrier and the customer. Therefore, although the provision of free rewards is a marketing activity, it does not violate the Act or our rules, provided the telecommunications service being marketed is the service currently subscribed to by the customer.[480]

B. Non-telecommunications Services Listed on Telephone Bill

157. CPNI is defined in section 222(f)(1)(B) of the Act as including "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." However, section 222(c)(1) prohibits a carrier's use of CPNI only where it receives the CPNI "by virtue of its provision of a telecommunications service."

158. In the Common Carrier Bureau's *Clarification Order*, the Bureau said that "customer information derived from the provision of any non-telecommunications service, such as CPE or information services . . . may be used to provide or market any telecommunications service . . . ."[481] Omnipoint asks the Commission to clarify that section 222 does not prohibit the use of customer information derived from non-telecommunications services bundled with telecommunications services merely because charges for those services appeared on a customer's telephone bill. Omnipoint contends that its position logically follows from the statement in the *Clarification Order*.[482] U S WEST agrees with Omnipoint's position, but contends that the statute is clear, and no clarification is required.[483]

159. Section 222(c)(1) prohibits the use of CPNI only where it is derived from the provision of a telecommunications service. Consequently, we find that information that is not received by a carrier in connection with its provision of telecommunications service can be used by the carrier without customer approval, regardless of whether such information is

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[479] Omnipoint Petition at 19; Omnipoint Reply at 8; Vanguard Petition at 15-16.

[480] Vanguard Petition at 16.

[481] *Clarification Order*, 13 FCC Rcd at 12392-93, ¶ 3.

[482] Omnipoint Petition at 19-20.

[483] U S WEST Comments at 24-25.

contained in a bill generated by the carrier. Therefore, consistent with the *Clarification Order*, customer information derived from information services that are held not to be telecommunications services may be used, even if the telephone bill covers charges for such information services.

C. Provision of Calling Card As "Provision" of Service

160. LECs often offer so-called "post-paid" calling cards that enable customers to complete long distance calls over a particular interexchange carrier's network when the customer is away from home. Such cards enable a customer to have the calls billed subsequently on the customer's local bill issued by the LEC. MCI asks the Commission to clarify that LECs may not use CPNI garnered in such circumstances to market services that the LEC offers absent permission from the customer.[484]

161. We grant MCI's request for clarification. In the traditional LEC post-paid calling card situation, the LEC serves merely as a billing and collection agent on behalf of the interexchange carrier, much as the LEC does when a customer places long distance calls from home through the customer's pre-subscribed interexchange carrier (IXC). In both instances, the customer has established a customer-carrier relationship for the provision of interexchange services with the IXC that carried the customer's call over its network. The LEC, on the other hand, is standing in the place of the IXC only for billing and collection purposes, a service which the IXC could have chosen to provide itself. Where a LEC acts as a billing and collection agent, it may not use CPNI without the customer's permission under the total services approach.

D. Use of CPNI to Prevent Fraud

162. Section 222(d)(2) of the Act permits the use of CPNI to "protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to services . . . ." Section 64.2005 of the Commission's Rules provides that a telecommunications carrier may use, disclose, or permit access to CPNI, without customer approval, for a number of purposes, but does not mention the use of CPNI in connection with fraud prevention programs.[485]

163. Comcast requests that the Commission clarify its rules to specify that (1) carriers are authorized to use CPNI in connection with fraud prevention programs; and (2)

[484] MCI Petition at 46.

[485] 47 C.F.R. § 64.2005.

such use is permissible even after a customer has terminated service from the carrier making such use of the customer's CPNI.[486] U S WEST argues that there is no need for the clarification requested by Comcast, because the statute is clear.[487]

164. We agree that Section 222(d)(2) on its face permits the use of CPNI in connection with fraud prevention programs, and does not limit such use of CPNI that is generated during the customer's period of service to any period of time. Since our rules do not cover the use of CPNI for fraud prevention programs, we will amend our rules to do so, in order to eliminate the possibility of misinterpretation.

E. Definition of "Subscribed" in Section 222(f)(1)(A)

165. We grant MCI's request for clarification of the meaning of the phrase "service subscribed to by any other customer" in section 222(f)(1)(A).[488] Section 222(f)(1) defines CPNI, in part, as follows:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service *subscribed* to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and
>
> (B) information contained in the bills pertaining to the telephone exchange service or telephone toll service received by a customer of a carrier . . ..[489]

MCI concludes that section 222(f)(1)(A) does not cover casual traffic, but section 222(f)(1)(B) does.[490] MCI further argues that under the usual meaning of the term "subscribed service," casual traffic such as its 1-800-COLLECT service calls would not be included because they are carried outside any subscribed service relationship.[491] MCI asserts that a comparison of section 222(f)(1)(A) with section 222(f)(1)(B) "may shed some light on this question" as it

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[486] Comcast Petition at 19.

[487] U S WEST Comments at 21.

[488] MCI Petition at 48-49.

[489] 47 U.S.C. § 222(f)(1) (emphasis added).

[490] MCI Petition at 48-49.

[491] MCI Petition at 48.

more broadly defines CPNI as information contained in telephone bills.[492] We conclude that MCI's reading of section 222(f)(1) is reasonable and clarify that casual traffic reflected in a customer's telephone bill is CPNI under 222(f)(1)(B), but is not "subscribed" service in 222(f)(1)(A).

F. CPNI "Laundering"

166. MCI requests clarification that "the status of information as CPNI or carrier proprietary information [under section 222] is not lost or altered if [a] carrier discloses or transmits such information to an affiliated or unaffiliated entity, whether or not that entity transfers such information to other parties or back to the original carrier."[493] MCI argues that the original carrier retains all of the obligations imposed by section 222 for such information, no matter where the CPNI or carrier proprietary information ultimately "resides."[494] As such, MCI concludes that carriers must take steps to safeguard all such information, especially information that is transmitted to third parties in the course of providing service.[495] MCI also seeks clarification that there is a rebuttable presumption that customer-specific information in a carrier's files was received on a confidential basis or through a service relationship governed by section 222.[496] MCI argues that the burden should be on the carrier to rebut the presumption through records showing the time and manner of its first receipt of the information.[497] MCI further asserts that customers should not be permitted to approve the use of CPNI that is also carrier proprietary information because carrier proprietary information is "absolutely protected under section 222(b)."[498]

167. We agree that as the stewards of CPNI and carrier proprietary information carriers must take steps to safeguard such information. Moreover, we find that implicit in section 222 is a rebuttable presumption that information that fits the definition of CPNI contained in section 222(f)(1) is in fact CPNI. We decline, however, to speak to MCI's other clarification requests as they regard issues relating to carrier proprietary information in section 222(b) and enforcement mechanisms to ensure carrier compliance with both sections 222(a)

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[492] MCI Petition at 48-49.

[493] MCI Petition at 53. *See also* TRA Comments at 8.

[494] MCI Petition at 53.

[495] MCI Petition at 53.

[496] MCI Petition at 53.

[497] MCI Petition at 54.

[498] MCI Petition at 54.

and (b). As the *Further Notice of Proposed Rulemaking* (*FNPRM*) in this docket seeks comment on those specific issues, we would not want to prejudice resolution of those issues in this order.[499]

G. Acts of Agents of Wireless Providers

168. Vanguard argues that sales agents of CMRS providers are not subject to Commission rules, and that CMRS providers should not be held responsible for the use of CPNI independently obtained by agents because it would be difficult or impossible for CMRS providers to enforce these obligations on agents. Vanguard contends that difficulties arise because agents may sell the services of competing providers and their contracts do not expire in the near future.[500]

169. MCI responds that carriers are always responsible for the acts of their agents and, if they share CPNI with agents, must take all steps necessary to ensure that the agent does not misuse CPNI.[501] Omnipoint proposes that carriers should not be held responsible for the *ultra vires* acts of agents and should not be liable for an independent agent's conduct unless the carrier has ratified it.[502]

170. We find that telecommunications service providers will be responsible for the actions of their agents to comply with our CPNI rules to the extent that telecommunications service providers share CPNI with their agents. Moreover, telecommunications service providers will be responsible for the actions of agents with respect to the use of CPNI acquired by their agents. It is well established that principals are responsible for the actions of their agents.[503] In the absence of such a rule, the important consumer protections enacted by Congress in section 222 may be vitiated by the actions of agents.

171. We believe that telecommunications service providers can meet these requirements through the private contract arrangements they have with their agents. Carriers would normally have negotiating leverage to enforce this requirement in the case of agents who serve more than one carrier, since all carriers would be required to enforce the same rules. To the extent that it may be shown that some carriers would not be able to enforce

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[499] *CPNI Order*, 13 FCC Rcd at 8200-202, ¶ 203-207.

[500] Vanguard Petition at 18-19; Vanguard Reply at 6-7.

[501] MCI Comments at 57--58.

[502] Omnipoint Reply at 9.

[503] *See, e.g., United States v. Park*, 421 U.S. 658, 670, 95 S. Ct. 1903, 1910 (1975); *McAndrew v. Mularchuk*, 33 N.J. 172, 189, 162 A. 2d 820, 830 (Sup. Ct. N.J., 1960).

these requirements, the Commission will address the exceptions on a case-by-case basis.

H. Information Known to Employees

172. Section 222(f)(1)(A) defines CPNI, in part, as including information "that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship."[504] We reject Comcast's argument that, based upon this definition, CPNI should not include "institutional knowledge" of the attributes of a particular customer's account gained by a carrier's employee from his or her work on the customer's account over the years if the employee does not actually access the customer's record,[505] and U S WEST's argument that so long as an employee does not use a customer's record containing that customer's CPNI, the employee has not violated section 222.[506] We are not persuaded that section 222(f)(1)(A) implies an exception based on whether the information acquired as part of the carrier-customer relationship is reduced to writing or is kept in the memory of a carrier representative. Thus, if a customer tells a carrier's employee information that otherwise fits the definition of CPNI provided in section 222(f)(1)(A), then that information is CPNI, no matter how the information is retained by the carrier.

I. Use of CPNI Under Section 222(d)(3) During Inbound Calls

173. Several carriers request that the Commission clarify the requirements for obtaining customer approval under section 222(d)(3).[507] This section states that "[n]othing in [section 222] prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents . . . to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service."[508] In other words, for purposes of an inbound call—*i.e.*, a call to a carrier initiated by a customer—a carrier may use a customer's CPNI to market to that customer, but only if so authorized by the customer and only for the duration of the inbound call.

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[504] 47 U.S.C. § 222(f)(1)(A).

[505] Comcast Petition at 18.

[506] U S WEST Comments at 21-22.

[507] GTE Petition at 40-41; TDS Petition at 10-11; MCI Comments at 56; SBC Comments at 21.

[508] 47 U.S.C. § 222(d)(3).

174. We agree with GTE, MCI, and SBC[509] that the detailed notification outlined in section 64.2007(f) of our rules is not necessary prior to soliciting a customer's approval to use his or her CPNI for the duration of an inbound call.[510] It is unduly burdensome to require carriers to comply with the rule in light of the limited coverage of section 222(d)(3).[511] Moreover, the rule reflects a discussion in the *CPNI Order* of the content of the general notification requirements under section 222(c)(1), and not those required for section 222(d)(3).[512] Accordingly, we clarify that section 64.2007(f) does not apply to solicitations for customer approval under section 222(d)(3).

175. We deny, however, TDS's request that we reconsider our prior conclusion that section 222(d)(3) requires an affirmative customer approval.[513] We previously stated in the *CPNI Order* that section 222(d)(3) "contemplates oral approval."[514] TDS asserts that "[i]t would better implement the exception Congress intended to provide for inbound marketing to infer approval [under section 222(d)(3)] from the call unless the customer indicates otherwise on the call."[515] We conclude that a plain reading of the statute contradicts TDS's conclusion: if Congress meant consent to be inferred from the mere fact that the customer initiated the call, it would not have required that the customer both initiate the call *and* "approve[] of the use of such information to provide such service."[516] We deny TDS's request for reconsideration for this reason and because TDS has not presented any new arguments or facts that the Commission did not consider in the *CPNI Order* with regard to this issue.

176. Finally, pursuant to GTE's request, we clarify that carriers need not maintain records of notice and approval of carrier use of CPNI during inbound calls under section

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[509] GTE Petition at 40-41; MCI Comments at 56; SBC Comments at 21.

[510] 47 C.F.R. § 64.2007(f).

[511] We believe, however, that in order for a customer to provide informed consent carriers must advise each customer—prior to soliciting permission to use his or her CPNI pursuant to section 222(d)(3)—of the specific CPNI the carrier wishes to use, the purpose for which the CPNI will be used, that the authorization to use the CPNI will only last for the duration of the call, and that a denial of approval will not affect the provision of any services to which the customer subscribes.

[512] *CPNI Order*, 13 FCC Rcd at 8161-65, ¶¶ 135-42.

[513] *TDS* Petition at 11.

[514] *CPNI Order*, 13 FCC Rcd at 8147-48, ¶ 111; *see also id.* at 8152, ¶ 118.

[515] TDS Petition at 10-11.

[516] 47 U.S.C. § 222(d)(3).

222(d)(3).[517] Section 64.2007(e) of the Commission's rules requires that carriers maintain customer notification and approval records for one year.[518] Notifications and approvals under section 222(c)(1) and 222(d)(3), however, are markedly different in scope. Notifications and approvals under section 222(c)(1) are valid until revoked or limited by the customer, whereas notifications and approvals for inbound calls pursuant to section 222(d)(3) are only valid for the duration of each call. Therefore, unlike the retention of records of notifications and approvals under section 222(c)(1), which we previously concluded would facilitate the disposition of individual complaint proceedings if the sufficiency of a customer's notification or approval is challenged at some later time,[519] requiring the retention of records of section 222(d)(3) notifications and approvals would provide little evidentiary value because the notification and customer's authorization to use CPNI automatically evaporate upon completion of the call. We do not find any advantage to requiring carriers to retain such records for purposes of section 222(d)(3). As such, we conclude that such a requirement would place an unnecessary burden on carriers.

X. PROCEDURAL ISSUES

177. As required by the Regulatory Flexibility Act (RFA),[520] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM*.[521] The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[522]

I. Need for and Objectives of this Order on Reconsideration and the Rules Adopted Herein.

178. In the Order on Reconsideration, the Commission reconsiders the rules promulgated in the *CPNI Order* in light of an expanded record to better balance customer

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[517] GTE Petition at 41.

[518] 47 C.F.R. § 64.2007(e).

[519] *CPNI Order*, 13 FCC Rcd at 8155, ¶ 123.

[520] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §·601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[521] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*FNPRM*).

[522] *See* 5 U.S.C. § 604.

privacy concerns with those of customer convenience with the effect of minimizing the impact of our requirements on all carriers, including small and rural carriers. We have amended our rules relating to flagging and audit trails for all carriers, which will have a beneficial impact on small carriers. Additionally, we modify our rules to permit all carriers to use CPNI to market CPE to their customers, without express approval. We also find that customers give implied consent to use CPNI to CMRS carriers for the purpose of marketing all information services, but only give implied consent to wireline carriers for certain information services. We further modify our rules to allow carriers to use CPNI to regain customers who have switched to another carrier.

II. Summary of Significant Issues Raised by Public Comments in Response to the FRFA.

179. As discussed in Section V, a number of small carriers or their advocates present evidence that the safeguard requirements of the CPNI rules are particularly burdensome for small and rural carriers.[523] We recognize, in light of the new evidence presented to the Commission, that the flagging and audit trail requirements promulgated in the *CPNI Order* might have a disparate impact on rural and small carriers. Our modification of the flagging and audit trail requirements in this order, however, effectively moots the requests we received from the parties seeking special treatment for small and rural carriers with respect to these requirements. Moreover, the restrictions lifted on the marketing of CPE and information services will lessen the impact of compliance with our rules for small and rural carriers, generally, and enable these carriers to more efficiently use their marketing resources.

III. Description and Estimates of the Number of Small Entities Affected by the First Report and Order.

180. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the actions taken in this *Order on Reconsideration*.[524] The RFA generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[525] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[526] A small business concern

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523 ALLTEL; Independent Alliance; NTCA; TDS; *see also* CenturyTel; RCA; US SBA.

524 *See* 47 U.S.C. § 603(b)(3).

525 *See* 47 U.S.C. § 601(6).

526 47 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment,